In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 654

ELIZABETH SIMONSON KING, EXECUTRIX OF THE ESTATE OF GEORGE STEWART KING, DECEASED, AND NATIONAL SURETY CORP., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Although we believe that the decision below is correct, we do not oppose the petition. It appears that there is a conflict of decisions between the court below and the Court of Appeals for the Fifth Circuit, and that the issues involved are recurrent.

1. This litigation involves the interpretation of R.S. § 3467, 31 U.S.C. 192, which subjects to personal liability "Every executor, administrator, or assignee, or other person, who pays * * * any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate * * *." That Section pro-

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vides the sanction for violation of R.S. § 3466, 31 U.S.C. 191, which directs, *inter alia*, that the debts due to the United States shall be first satisfied when a debtor is insolvent and his insolvency is manifested by the commission of an act of bankruptcy.

The United States instituted this action under 31 U.S.C. 192 to subject petitioner's decedent, George S. King, to personal liability for violation of 31 U.S.C. 191. A referee in bankruptcy, pursuant to Section 337 of the Bankruptcy Act, 11 U.S.C. 737(1), had appointed King the distributing agent of a debtor corporation in an arrangement proceeding under Chapter XI of the Bankruptcy Act; 11 U.S.C. 701, *et seq.* King, who was also president of the corporation, was directed to carry out the plan of arrangement by distributing a fund of $160,193.68 to be deposited by the debtor. The plan of arrangement contained no written provision concerning the government's then unliquidated claim;[1] however, that claim was orally referred to by counsel for the debtor at the hearing on the plan and the referee allowed the government additional time to file its proof of claim. King was present in the courtroom at the time of the hearing on the plan.

Between March 21, 1947, the date of the hearing on the plan of arrangement, and May 9, 1947, the date on which the government filed its preliminary proof of claim in the amount of $26,818.82, all but $6,085.01 of the fund deposited with the distributing agent had

[1] That claim, the validity of which is not in dispute in this litigation, arose out of contracts between the debtor and the Department of the Army.

been paid to creditors other than the government, including the sum of $42,829.76 paid by King to himself as a creditor of the bankrupt. This action was brought to recover the sum of $25,831.08 from King; judgment for $10,000 was sought from his surety.

The court below held that King, as distributing agent, was within the class of persons named by 31 U.S.C. 192 in the phrase "Every executor, administrator, or assignee, or other person" as being subject to personal liability for violation of the priority accorded the government by 31 U.S.C. 191. The court recognized that "Sections 191 and 192 of 31 U.S.C.A. must be interpreted *in pari materia*, as parts of a 'common statutory scheme'" (Pet. App. 20–21). It rejected petitioners' claim that a distributing agent, as a mere arm of the court, was compelled to follow the distribution established by the bankruptcy court, and was, therefore, relieved of personal liability for violations of 31 U.S.C. 191. The court noted that changes in distribution could have been effected by the distributing agent—in the same way a receiver or trustee in bankruptcy may effect such changes—by timely application to the bankruptcy court.[2]

[2] That King knew of the government's claim at the time he made the payments asserted to be in violation of Section 192 is clear. As the court below pointed out, King, as president of the debtor corporation prior to the Chapter XI proceeding, "well knew or should have known of the unresolved claim of the United States" (Pet. App. 26). Furthermore, the stipulation of facts between the parties noted that King was present in the courtroom at the hearing on the plan of arrangement, at which time counsel for the debtor corporation orally referred to the government's claim.

2. The decision of the court below is in conflict with the decision of the Fifth Circuit in *United States* v. *Stephens*, 208 F. 2d 105, which held 31 U.S.C. 192 inapplicable to a court-appointed receiver. The Fifth Circuit interpreted the statute as subjecting to liability only personal representatives of the debtor, *i.e.*, those standing in relation to the debtor as agents or as similar representatives. It reasoned that the designation "or other person" in the statute limits those standing as personal representatives to one "who pays in whole or in part any debt *due by the person or estate for whom or for which he acts*" (emphasis in original). 208 F. 2d at 108. The court therefore concluded that Section 192 could not be applied to a receiver, a person who acts for and under the court rather than for the debtor.

The Fifth Circuit's reasoning was rejected both by the court below and by the Ninth Circuit in *United States* v. *Crocker*, 313 F. 2d 946. In the latter case, the court stated (313 F. 2d at 949) that:

> [T]he debts paid by a liquidating receiver, like those paid by an executor, administrator, or assignee for the benefit of creditors, are primary obligations of the debtor: the phrase "for whom, or for which he acts" should be read as a general acknowledgment of this fact rather than as imposing a restriction upon the reach of Section 192 inconsistent with the overall purpose of this section and Section 191.[3] * * *

[3] The Ninth Circuit went on to say that: "In terms of the purpose of the two sections, the significant characteristic which persons in the classes named in Section 191 [*sic* Section 192] have in common is not that they represent debtors rather than

In our view, the court below, and the Ninth Circuit in the *Crocker* case, correctly interpreted Section 192. In bankruptcy proceedings the court exercises a general supervisory function and it is the duty of the distributing agent or receiver to inform the court of any priorities which must be honored. Approval of a distribution in contravention of a right of priority would not be given by the court knowingly, but only on the advice of the distributing agent, receiver, or other person. When an "officer of the court"—whether executor, administrator, distributing agent, or receiver—pays a debt out of the funds entrusted to him, he is obviously not paying the court's debt; he is paying, albeit under the control of the court, the debt of the person or estate whose property is in his care. Each official is an "officer of the court" in that his actions must be approved by the court, but he is a "personal representative" with regard to his dealings with the debtor's assets. Thus, a distributing agent or receiver, like an executor, administrator, or assignee, is "acting for" a debtor within the meaning of Section 192 simply by virtue of the fact that he is empowered to deal with his property.

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courts, but rather that they are given possession and control of assets of debtors and are charged with the payment of debtors' obligations." 313 F. 2d at 949. The court below referred to this reasoning and concluded that not even "control" of the fund by the disbursing individual was required as a prerequisite to Section 192 liability. It noted that the statute does not require "control", but rather states that "every * * * other person, who pays * * *" in disregard of the government's Section 191 priority shall be liable, regardless of control.

Cf. *Field* v. *United States*, 9 Pet. 182.[4] The Fifth Circuit's holding to the contrary undermines Sections 191 and 192. Under the *Stephens* decision, court-appointed representatives of debtors involved in bankruptcy proceedings may knowingly ignore the priority in payment accorded the government by Section 191 and thereafter assert *pro forma* court approval of their action as a defense to their personal liability under Section 192.

CONCLUSION

For the foregoing reasons, we do not oppose the petition for a writ of certiorari.

Respectfully submitted,

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[4] In *Field*, this Court expressly rejected the contention that a court order approving the distribution provided a defense to a suit by the United States to impose personal liability on trustees in bankruptcy who had disregarded the government's priority.

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